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No. 10-237

In the Supreme Court of the United States

CRAIG BUONORA,

Petitioner,

v.

DARRYL T. COGGINS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The petitioner is a policeman who conspired to falsely arrest the respondent, fabricate evidence against him, and testify perjuriously before a grand jury. Now confronting respondent's federal civil rights lawsuit, petitioner seeks this Court's interlocutory review of the lower courts' decision at the motion-to-dismiss stage that he is not entitled to absolute immunity under *Briscoe* v. *LaHue*, 460 U.S. 325 (1983). The questions presented are:

1. Whether the Court should grant interlocutory review to consider whether the *Briscoe* rule of absolute immunity for trial testimony should extend to an extra-judicial conspiracy to present perjured grand jury testimony.

2. Whether the Court should grant interlocutory review to determine whether the district court correctly held it premature to decide, at the motion-to-dismiss stage, whether petitioner was a "complaining witness" who is not entitled to absolute testimonial immunity.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Petitioner is a policeman who, along with a colleague, initiated and encouraged respondent's arrest and prosecution on trumped-up weapons charges. Months later, the two officers lied to a grand jury to secure a criminal indictment of respondent resting on their false testimony and fabricated evidence; petitioner subsequently pleaded guilty to a charge of perjury stemming from those events. But petitioner now asks this Court to protect him from civil liability under 42 U.S.C. § 1983 for his conspiracy to falsely arrest, jail, and indict respondent. The Court should deny this request. The lower courts sensibly declined at this early motion-to-dismiss stage to grant petitioner absolute immunity for conspiring to prosecute an innocent man, and this Court should not disturb that determination.

In seeking review of the decisions below, petitioner maintains that the Second Circuit's recognition of a conspiracy exception to the immunity from liability for false grand jury testimony is inconsistent with this Court's decision in *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), and in conflict with the holdings of other courts of appeals. Decision of that issue, however, is not necessary for the resolution of this case. The court below identified a second, independent basis for denying petitioner immunity from Section 1983 liability, the "complaining witness" doctrine, and remanded the case for a factual determination whether the requisites of *that* doctrine are present here. If they are, there will be no need for the Court to resolve the question presented in the petition. For

that reason alone, further review of this case, at least at this time, is inappropriate.

Even considered on its own terms, the questions presented by petitioner do not warrant this Court's attention. The instant case involves allegations of a broad conspiracy unfolding over many months, while *Briscoe* did not involve a conspiracy at all and most of the appellate decisions cited by petitioner involved limited conspiracies directed only at the presentation of false testimony; it is not at all apparent that the courts issuing those decisions would reject the Second Circuit's approach on the facts here. Moreover, in contrast to decisions in most other circuits, this case involves testimony before the *grand* jury—where lies are less likely to be uncovered and where, consequently, more robust liability rules are appropriate. And the issue presented in the petition is, in any event, one of limited practical importance: in fact, we are not aware of *any* case in which a court within the Second Circuit *ever* has held a defendant liable through application of the conspiracy exception. The petition accordingly should be denied.

A. Factual Background

1. Respondent's Encounter With Police

On October 9, 2004, respondent was driving a car when he was pulled over by Nassau County police officer James Vara in the Village of Floral Park on Long Island, New York. Pet. App. 72a.[1] Vara refused

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[1] These facts are drawn from the complaint and materials included by petitioner in his petition appendix. Because this case was resolved at the motion-to-dismiss stage, the allegations in the complaint must be presumed true. *Erickson* v. *Pardus*, 551 U.S. 89, 93-94 (2007).

to tell respondent the reason for the stop (Pet. App. 72a), although the officer's conduct strongly suggested that it was motivated by respondent's race. Compl. ¶¶ 31, 34. Vara asked respondent to step out of the car, administered a sobriety test, and called for backup. Pet. 4; Pet. App. 72a-73a. Petitioner then arrived on the scene. Pet. App. 72a-73a. One of the officers grabbed respondent and, when respondent protested, threatened "to do more than grab him." Pet. App. 73a. Respondent, scared, began to run. Pet. App. 73a. One of the officers shouted, "Shoot him in the back." Pet. App. 73a. Respondent kept running, jumped over a fence, and took a cab home. Pet. App. 73a. Respondent did not have a gun during his encounter with police. Pet. App. 73a.

2. Respondent's Arrest

Respondent subsequently turned himself in to authorities, was arrested and subjected to a strip and body cavity search, and was charged with two counts of criminal possession of a weapon. Compl. ¶¶ 19, 37. As evidenced by the subsequent false testimony of petitioner and Vara before the grand jury, the apparent basis for the charges was (1) Vara's representations that he heard an object fall to the ground as respondent was jumping over the fence, and that Vara later returned and identified the object as a 9-millimeter handgun; and (2) petitioner's virtually identical statements that he heard a 9-millimeter handgun fall from respondent as respondent jumped the fence, and that petitioner remained with the handgun until he was relieved by another officer. Compl. ¶¶ 19, 23, 24. Respondent was jailed for two days before securing release on bail of $10,000 cash and a $25,000 bond. Compl. ¶¶ 19-20. The charges

carried a potential penalty of two to seven years in prison. Compl. ¶ 19.

3. Petitioner's Perjury Before The Grand Jury

More than five months later, a state grand jury convened to consider whether to indict respondent on weapons charges. Compl. ¶ 20. Both petitioner and Vara lied to the grand jury. Both claimed that they heard a gun drop to the ground while chasing respondent. Compl. ¶¶ 23-24. Petitioner testified that "I heard a noise as [respondent] went to jump the fence, which sounded like metal hitting the ground * * *. I looked down to see what it was and found the gun there." Pet. App. 30a-31a. Petitioner further testified that he stayed with the gun to "safeguard" it. Pet. App. 32a. Likewise, Vara testified that, "as [respondent] jumped over the fence, I heard a metal noise hitting concrete, and I looked down, and I saw an object laying on the driveway * * *. My assisting officer [petitioner] stayed there at the scene * * *." Pet. App. 32a.

Respondent testified before the grand jury and maintained his innocence. Pet. App. 72a-73a. But following the false, coordinated testimony of petitioner and Vara (Compl. ¶¶ 23-24), the grand jury voted to indict respondent. Compl. ¶ 22. Although the passengers riding in the car with respondent were prepared to testify in support of his account, their evidence was not presented to the grand jury. Compl. ¶¶ 21-22; Pet. App. 74a.

4. Petitioner's Perjury Is Exposed

The perjury of petitioner and Vara came to light in July 2005, when a police officer from the Village of Floral Park contacted respondent's counsel to advise

that it was that officer—not petitioner or Vara—who had first discovered a handgun lying on the ground in the area where Vara had chased respondent. The Floral Park officer also stated that he had not seen the gun until approximately forty minutes after the pursuit had begun. Compl. ¶ 25. Radio transmissions from the date of the incident confirmed the local officer's account. Compl. ¶¶ 25-26. These disclosures led the prosecutor to dismiss the entire case against respondent and, in turn, to charge petitioner with perjury before the grand jury. Compl. ¶¶ 27-28. Petitioner eventually pleaded guilty to criminal perjury. Compl. ¶ 28.

B. Proceedings Below

1. The Complaint

On August 28, 2007, respondent filed this suit against petitioner and other defendants pursuant to 42 U.S.C. §§ 1981 and 1983 and state tort law. Compl. ¶ 1. The allegations in the complaint focus chiefly on petitioner's role as a "complaining witness[]." Compl. ¶ 23. The complaint alleges, for example, that petitioner "actively instigated and encouraged the baseless prosecution" of respondent. Compl. ¶ 19. In addition, it states that "each of the Defendants took an active role in creating and manufacturing the charges against [respondent], solely for the purposes of effecting an arrest and conviction." Compl. ¶ 46.

The complaint also alleges misconduct by petitioner, including the false arrest and false imprisonment of respondent, that occurred several months *prior to* petitioner's eventual perjury before the grand jury. It alleges, for example, that petitioner "deprived [respondent] of his Fourth, Fifth, Sixth,

and Fourteenth Amendment rights, and caused such deprivation of rights by unlawfully stopping, falsely detaining, unlawfully accusing, wrongfully arresting and falsely imprisoning [respondent] for two days." Compl. ¶¶ 31, 40. The complaint further alleges that the "seizure [of respondent] was made without probable cause" as petitioner was "of the knowledge that [respondent] had committed no crime" (Compl. ¶ 42), that petitioner and the other defendants "prolonged [respondent's] captivity by failing to investigate [his] protests that he was not the alleged perpetrator and by conspiring to set bail at an unreasonable amount" (Compl. ¶ 33), and that petitioner and the other defendants "withheld information which would have exonerated [respondent] of the criminal charges" he faced. Compl. ¶ 44.

2. Petitioner's Motions

Petitioner moved to dismiss the claims or, alternatively, for summary judgment, on the grounds of absolute testimonial immunity. He relied chiefly on *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), in which this Court concluded that a police officer has absolute immunity from civil damages under Section 1983 for giving perjured testimony at a criminal trial.

Respondent countered that petitioner was not entitled to absolute immunity for several reasons. Pl. Opp. to Def. Mot. to Dismiss 8-11.[2] First, respondent contended—as alleged in the complaint (Compl. ¶ 23)—that petitioner was a "complaining witness" who, in contrast to ordinary testimonial witnesses, is not entitled to absolute immunity under *Briscoe*. Re-

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[2] *Coggins* v. *County of Nassau*, No. 2:07-cv-03624-JFB-AKT (E.D.N.Y. Feb. 29, 2008).

spondent contended that later discovery would factually substantiate petitioner's complaining witness role.

Second, respondent argued that the complaint against petitioner involved *more* than just his false testimony at the grand jury proceedings. See, *e.g.*, Compl. ¶¶ 19, 36, 72, 79, 80. Respondent contended that the *Briscoe* rule of absolute testimonial immunity does not extend retroactively to immunize pretestimonial conduct of police officers who engage in unlawful arrest, fabrication of evidence, and the initiation or instigation of a malicious prosecution.

Third, respondent noted that, even if the focus were on only petitioner's false grand jury testimony, the holding in *Briscoe* is limited to perjured testimony *at trial* and therefore does not apply to petitioner's testimony before the grand jury. See *Briscoe*, 460 U.S. at 328 n.5 (leaving open the question of immunity for testimony at pre-trial proceedings).

3. The District Court's Ruling

Because discovery had not yet begun, the district court treated petitioner's motion solely as one to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), and not as a motion for summary judgment pursuant to Fed. R. Civ. P. 56. Pet. App. 13a-15a (citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 326 (1986)). On the basis of respondent's substantiated showing of need for discovery,[3] the district court concluded that petitioner's summary judgment motion was premature and

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[3] Respondent submitted an affidavit pursuant to Fed R. Civ. P. 56(f) attesting to the need for discovery. The district court's assessment of that affidavit, which petitioner asks this Court to review, is discussed below at 17-18.

should be dismissed without prejudice to his renewing it at the close of discovery. Pet. App. 15a-18a.

Turning to the merits of the motion to dismiss, the district court denied petitioner's claim of absolute immunity on two independent grounds.[4] First, it noted the well-established law of the Second Circuit that a "complaining witness" is not entitled to the benefit of absolute testimonial immunity. Pet. App. 24a (citing, *e.g.*, *White* v. *Frank*, 855 F.2d 956, 958-959 (2d Cir. 1988), which held, in reliance on *Malley* v. *Briggs*, 475 U.S. 335 (1986), that a "complaining witness" is not subject to the *Briscoe* immunity rule). The district court concluded, however, that it was not possible at the Rule 12(b)(6) stage to determine as a factual matter whether petitioner had acted as a "complaining witness." Pet. App. 25a-27a. The district court noted that the complaint "alleges acts by [petitioner]—separate and apart from perjury—that served to initiate [respondent]'s prosecution," including allegations that petitioner "'ordered and directed' [respondent]'s arrest and detention (Compl. ¶ 43), and 'withheld information which would have exonerated [respondent] of the criminal charges with which he was charged' (Compl. ¶ 44) * * *." Pet. App. 25a.

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[4] In deciding to treat petitioner's motion as one to dismiss, the district court took judicial notice of transcripts from respondent's grand jury proceedings that were addressed in the complaint. See, *e.g.*, *Roth* v. *Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (noting that "[i]n certain circumstances, the court may permissibly consider documents other than the complaint in ruling on a motion under Rule 12(b)(6)"). The district court declined to consider various other exhibits proffered by petitioner, but held that even had they been considered, "those additional documents would not change the Court's analysis at this stage of the litigation." Pet. App. 19a-20a.

Thus, while stressing that "the availability of absolute immunity should be decided at the earliest possible juncture," the district court "decline[d] to rule as a matter of law at this stage" on the immunity claim because it could not resolve the factual question whether petitioner was a complaining witness. Pet. App. at 26a.

Second, apart from the "complaining witness" doctrine, the district court noted "an additional, independent obstacle to [petitioner's] assertion of absolute immunity at this juncture" (Pet. App. 27a): the Second Circuit has recognized an exception to *Briscoe* for extra-judicial conspiracies to present perjured testimony before a grand jury. Pet. App. 27a-28a (citing *Dory* v. *Ryan*, 25 F.3d 81 (2d Cir. 1994), and *San Filippo* v. *U.S. Trust Co. of N.Y., Inc.*, 737 F.2d 246 (2d Cir. 1984)). Accordingly, petitioner could not qualify for absolute immunity to the extent that "the complaint alleges that Vara and [petitioner] conspired to commit perjury during [respondent]'s grand jury proceedings." Pet. App. 27a. The court noted that there was no dispute that petitioner pleaded guilty to perjury and found that the complaint alleged facts sufficient to support an inference of an extra-judicial conspiracy to commit perjury, insofar as petitioner and Vara offered interlocking accounts to the grand jury falsely claiming that both heard respondent drop a gun. Pet. App. 30a-33a. The court cautioned that it "reaches this conclusion [concerning application of the extra-judicial conspiracy exception to absolute immunity] without prejudice to [petitioner] arguing that he is entitled to immunity at the summary judgment stage, after the parties

have had the opportunity to conduct discovery." Pet. App. 34a n.8.[5]

4. The Court Of Appeals Decision

By unpublished summary order, the court of appeals affirmed in part and dismissed in part. Pet. App. 1a-4a. First, with respect to the district court's ruling concerning the extra-judicial conspiracy exception, the Second Circuit noted that "[i]n this Circuit, * * * absolute immunity does not extend to allegations of conspiracy to present false testimony." Pet. App. 3a. Second, the court concluded that "[a]bsent a more developed record of undisputed facts, we are unable to determine as a matter of law that Buonora was not a complaining witness." The court therefore held that "we lack jurisdiction to consider this issue" on interlocutory appeal from the denial of a motion to dismiss. Pet. App. 3a. The court remanded the case for further proceedings.

REASONS FOR DENYING THE PETITION

In seeking review, petitioner maintains that the Second Circuit's recognition of an extra-judicial conspiracy exception to the immunity rule of *Briscoe* departs from this Court's holding in that case and conflicts with the decisions of most other courts of appeals. But he is wrong on both counts. *Briscoe* did not purport to immunize extra-judicial acts of conspiracy, like those committed by petitioner here, and the theory underlying *Briscoe* offers no support for that

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[5] With regard to respondent's state-law claims, the district court dismissed without prejudice the claims for abuse of process and malicious prosecution and granted respondent "leave to replead the requisite special damages with sufficient specificity." Pet. App. 43a.

expansive rule of immunity. Similarly, although some courts of appeals have rejected a general conspiracy exception to *Briscoe*, the decisions from other circuits cited by petitioner differ from this case in material respects, and there is reason to believe that those courts, if presented with facts like those here, would accept the Second Circuit's rule.

Petitioner, however, also has a more immediate and basic problem in seeking review: decision of the principal question he presents in the petition is unnecessary now and very likely would have no bearing on the ultimate outcome of this case. Wholly apart from the conspiracy exception to testimonial immunity, the district court held below that petitioner's immunity might be pierced by application of the *separate* complaining witness doctrine; the court of appeals, which lacked jurisdiction to consider petitioner's challenge to that ruling, remanded the case for a factual determination whether the complaining witness rule applies in this case. If it does, there would be no reason *ever* to decide the conspiracy issue presented in the petition. In such circumstances, review of this case now plainly is unwarranted.

I. THIS CASE IS A POOR VEHICLE FOR REVIEW OF THE EXTRA-JUDICIAL CONSPIRACY EXCEPTION BECAUSE RESOLUTION OF THE ISSUE WILL NOT DETERMINE PETITIONER'S ENTITLEMENT TO IMMUNITY.

Petitioner's principal contention is that the Court should grant review to determine the validity of the conspiracy exception to testimonial immunity. Pet. 7-24. But even if that question might warrant this Court's consideration in *some* case—and, as we show below, it does not—review in *this* case would be im-

proper. This question is of only academic, and secondary, importance here: whatever the application of the conspiracy exception to testimonial immunity, this case will proceed on remand to determine application of the separate complaining witness doctrine. And if that doctrine is held to apply after further factual development below, resolution of the conspiracy question presented in the petition will be wholly unnecessary. For that reason alone, the petition should be denied.

A. Continued Litigation Regarding The Complaining Witness Issue Will Be Necessary Regardless Of The Disposition Of The Petition.

Even if this Court were to grant review and reject the extra-judicial conspiracy exception to immunity, this suit would still proceed. As petitioner recognizes, the complaining witness doctrine offers a *separate* basis for piercing his immunity. See Pet. 9. Rooted in this Court's recognition that "complaining witnesses were not absolutely immune at common law" (*Malley* v. *Briggs*, 475 U.S. 335, 340 (1986)), that doctrine strips immunity from "one who procured the issuance of an arrest warrant by submitting a complaint" that "was made maliciously and without probable cause." *Id.* at 340-41; see also *Wyatt* v. *Cole*, 504 U.S. 158, 164-165 (1992) (complaining witness is one who "set[s] the wheels of government in motion by instigating a legal action"). As the Second Circuit and other courts of appeals accordingly have recognized, a complaining witness who "initiat[es] a baseless prosecution" through "testimony at a judicial proceeding" is "liable to the victim under section 1983." *White* v. *Frank*, 855 F.2d 956, 961 (2d Cir. 1988); see also, *e.g.*, *Harris* v. *Roderick*, 126 F.3d

1189, 1199 (9th Cir. 1997); *Anthony* v. *Baker*, 955 F.2d 1395, 1399 (10th Cir. 1992).

Here, respondent invoked the complaining witness rule. The district court left the application of the doctrine unresolved, finding that further factual development was necessary to determine whether respondent was in fact a complaining witness. Pet. App. 23a-27a. And the court of appeals correctly determined that it did not have jurisdiction to decide whether petitioner was a complaining witness on interlocutory appeal because the factual record is undeveloped. Pet. App. 3a.

In these circumstances, review by this Court plainly is premature: the case is interlocutory, further proceedings below are unavoidable, and those proceedings could moot the conspiracy issue presented in the petition. This is the paradigm of the situation in which "the lack of finality in the judgment below may 'of itself alone' furnish 'sufficient ground for the denial of the [petition].'" Eugene Gressman *et al.*, SUPREME COURT PRACTICE 280 (9th ed. 2007) (quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)); see also *id.* at 82 ("[R]eview of a nonfinal order may induce inconvenience, litigation costs, and delay in determining ultimate justice." (citing *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152-153 (1964))). Here, moreover, there would be no countervailing interest to be served by immediate review. Ordinarily, as petitioner notes (Pet. 20), there is value in a quick resolution of immunity claims "so that the costs and expenses of trial are avoided where the [immunity] defense is dispositive." *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001). But that consideration is wholly absent in this case because further proceedings will be held in the district

court in any event. And if petitioner *is* held to be a complaining witness after remand, there will be no need at all for the Court to resolve the conspiracy question presented here.

This consideration militates against immediate review with particular force here because the facts alleged in the complaint strongly suggest that petitioner *will* be found to be a complaining witness. As the Court explained in *Malley*, a police officer who causes a victim to be arrested unconstitutionally does not receive absolute immunity. *Malley*, 475 U.S. at 341. In *Mejia* v. *City of New York*, a case illustrative of how the district court will determine petitioner's complaining witness status here, the court stated that an individual is a complaining witness "if the information [he] falsely gave the prosecutor induced the prosecutor to act." 119 F. Supp. 2d 232, 272 (E.D.N.Y. 2000).

That would seem to be this case. Petitioner has already pled guilty to perjuring himself before the grand jury that indicted respondent. Pet. App. 11a. The Nassau County District Attorney's Office dismissed the charges against respondent when it discovered petitioner's perjury, suggesting that the perjured testimony, along with the manufactured evidence, was central to the decision to indict. *Ibid.* In addition, respondent alleged that petitioner "ordered and directed" respondent's arrest and detention (Compl. ¶ 43) and "withheld information which would have exonerated [respondent] of the criminal charges." Compl. ¶ 44. Such actions also amounted to an inducement for the prosecutor to act. On the facts alleged, it thus is likely the district court on remand will find petitioner to be a complaining witness not entitled to absolute immunity. And that will make a

ruling by this Court on the conspiracy exception unnecessary.

B. Petitioner's Procedural Criticisms Of The District Court's Denial Of Summary Judgment Are Meritless.

In fact, petitioner evidently recognizes that he cannot prevail on immunity grounds (and that consideration of the case by this Court therefore is inappropriate) so long as the complaining witness issue remains in the case. He accordingly asks the Court to review not only the conspiracy question, but also the district court's denial of his motion for summary judgment on the complaining witness issue. But as to that, petitioner does not contest the validity of the complaining witness doctrine generally; instead, he asserts only that the Second Circuit misapplied its *own* summary judgment law. Pet. 24-31. That contention is self-evidently insupportable for several reasons. As a consequence, petitioner's argument for review of the complaining witness issue addressed below lacks merit; the case necessarily will proceed no matter how the conspiracy issue is resolved—and review accordingly should be denied.

First, the simple fact is that the Second Circuit had—and this Court has—no jurisdiction to consider petitioner's challenge to the interlocutory denial of his summary judgment motion. Generally, the denial of a motion to dismiss or for summary judgment is not a final judgment subject to appeal under 28 U.S.C. § 1291. Appeal is permitted where the motion is premised on a defendant's immunity from suit, but *only* "to the extent that it turns on an issue of law." *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985). Thus, where "the district court's determination [is] that the summary judgment record * * * raised a genuine is-

sue of fact," a decision relating to immunity is "not appealable." *Johnson* v. *Jones*, 515 U.S. 304, 313 (1995); see also *Walczyk* v. *Rio*, 496 F.3d 139, 153 (2d Cir. 2007) (denial of motion to dismiss is appealable only "to the extent the immunity claim presents a 'purely legal question'" (quoting *Mitchell*, 472 U.S. at 530)). That is the case here: the court below held that resolution of the complaining witness issue required factual inquiry, to be undertaken by the district court, into the circumstances of petitioner's grand jury testimony. Thus, the court of appeals not only had no obligation to engage in an interlocutory *de novo* review of this fact-intensive evidentiary question, as petitioner demands (Pet. 25, 28-29); it had no appellate jurisdiction to do so. See Pet. App. 3a; *White*, 855 F.2d at 957; *Anthony*, 955 F.2d at 1399.[6]

Second, even if there were jurisdiction to consider petitioner's challenge, he would be wrong in contesting the district court's conclusion that summary judgment was premature because respondent had not yet had an opportunity to conduct discovery. See Pet. 29. Summary judgment is proper only if materials such as "depositions, * * * admissions, [and] interrogatory answers * * * do not establish the absence or presence of a genuine dispute." Fed. R. Civ. P. 56(c)(1). Rule 56 contemplates "adequate time for discovery" prior to the entry of summary judgment. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986); see also *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 884 (1990) (reaffirming *Celotex*). But respondent

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[6] Petitioner appears to suggest that *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), held all immunity claims appealable. Pet. 21 n. 4. In fact, *Iqbal* did not depart from the settled rule limiting interlocutory immunity appeals to matters that "turn[] on an issue of law." 129 S. Ct. at 1946 (quoting *Mitchell*, 472 U.S. at 530).

has not at this juncture had the opportunity to depose petitioner, or anyone else. The district court therefore lacked sufficient information to evaluate petitioner's motion pursuant to Rule 56(c).

Significantly, while petitioner argued before the court of appeals that he was entitled to summary judgment, he did not dispute the district court's analysis of his motion to dismiss pursuant to Rule 12(b)(6). Petitioner has therefore waived any challenge to the district court's finding, under Rule 12(b)(6), that the complaint adequately alleged specific acts by petitioner that served to initiate and continue respondent's prosecution. Pet. App. 25a-26a. Because the sufficiency of the pleading has clearly been established in accordance with the standard this Court set out in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), petitioner's reliance on cases such as *Thomas* v. *Roach*, 165 F.3d 137, 147 (2d Cir. 1999), where summary judgment was granted prior to discovery *because the pleadings were facially deficient*, is unavailing.

Third, petitioner quarrels with the district court's evaluation of the affidavit that respondent submitted in support of his averment of the need to conduct discovery before responding to a summary judgment motion. See Pet. 27-28. The Second Circuit has specified the required showing to be made in such a Fed. R. Civ. P. 56(f) affidavit. See *Gurary* v. *Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999) (stating that an affidavit must show "'(1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts'" (alteration

in original)). Petitioner does not contend that these standards are in conflict with those of other circuits or with this Court's opinions. He merely attempts to second-guess the district court's application of Second Circuit precedent to respondent's affidavit in this case.[7] This claim does not merit this Court's review.

II. THE DECISION BELOW IS CORRECT.

For the reasons explained above, consideration of the issues presented in the petition are premature. But even if that were not so, review of this case would not be warranted. We explain below why petitioner is incorrect in asserting that there is a pervasive conflict in the circuits on the question presented here. But before turning to that issue, we address petitioner's initial contention that the holding below is inconsistent with *Briscoe*. See Pet. 9-13. On this, petitioner is wrong: the Second Circuit's decision is a faithful application of this Court's precedent.

A. The Extra-Judicial Conspiracy Exception Follows From This Court's Recognition That Conspiracies Are Crimes That Are Separate From The Object Of The Conspiracy.

1. In *Briscoe*, the decision on which petitioner principally relies, the Court held that a police officer

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[7] Respondent's affidavits, Pet. App. 64a-76a, laid out in detail the disputed facts for which discovery is necessary. The district court found that respondent had "wholly complie[d] with the standard the Second Circuit has set forth for compliance with Rule 56(f); he has particularized the discovery required — the materiality of which * * * is beyond dispute — and has explained why he has not obtained discovery to date." Pet. App. 16a.

is immune from Section 1983 liability for false testimony offered at a criminal trial in support of the plaintiff's conviction. The Court relied on common law history, observing that "[t]he immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings" was established at the time of Section 1983's enactment. 460 U.S. at 330-333, 336 n.15. This doctrine was premised on the understanding that absolute witness immunity was necessary to prevent "two forms of self-censorship." *Id.* at 333. First, immunity ensures that witnesses will not be "reluctant to come forward to testify." *Ibid.* Second, "once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability." *Ibid.* Immunity thus encourages witnesses to make "'full disclosure of all pertinent information within their knowledge.'" *Id.* at 336.

But these rationales for immunity have no application when the Section 1983 suit challenges, not false *testimony* offered in court, but an extra-judicial *conspiracy* to commit perjury. Insofar as immunity rests on "functional categories" (*Briscoe*, 460 U.S. at 342) or an official witness's "critical role in the judicial process" (*id.* at 336), the conduct meriting protection is the testimony itself; it is not the extra-court agreement to further an unwarranted prosecution.

This conclusion follows directly from the Court's consistent recognition that conspiracies are "evil" acts, quite "distinct" from the substantive crimes they are formed to commit. *Salinas* v. *United States*, 522 U.S. 52, 65 (1997); see also *Callanan* v. *United States*, 364 U.S. 587 (1961); *Pinkerton* v. *United States*, 328 U.S. 640 (1946); *United States* v. *Rabi-*

nowich, 238 U.S. 78 (1915). "It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues" (*Salinas*, 522 U.S. at 65); a conspiracy is "an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime." *Rabinowich*, 238 U.S. at 88. This characterization of conspiracies as separate from, and often worse than, substantive crimes weighs heavily in favor of recognizing that immunity for testimony does not extend to prior conspiracies to falsify testimony.

By the same token, the prophylactic policies that favor absolute witness immunity—policies that justify allowing witnesses to escape liability for their testimony even when they commit perjury—have no direct application to conspiracies to commit criminal acts. On the one hand, the injury inflicted by conspiratorial conduct may be vastly greater than that caused by a perjurer who acts alone, as the existence of the criminal agreement both cements each participant's intent to testify falsely and magnifies the impact of the false testimony. The Court has noted that conspiracies "involve[] deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices," and are "characterized by secrecy, rendering [them] difficult of detection, requiring more time for [their] discovery, and adding to the importance of punishing [them] when discovered." *Pinkerton*, 328 U.S. at 644 (internal quotations omitted). And on the other hand, the benefits of immunity are greatly diminished in the conspiracy context: when the focus is on extrajudicial agreement rather than in-court testimony, the prospect of liability is much less likely to deter truthful testimony. In this setting, the balance tips in favor of the additional deterrence Section 1983 li-

ability provides to discourage the extra-judicial conspiracy in the first place.

2. In punishing the conspiracy and not the testimony, the conspiracy exception in no way undermines the absolute immunity awarded legitimate testimony. The exception serves only to discourage non-testimonial, extra-judicial conduct committed *before* a judicial proceeding. Those witnesses who mistakenly offer false evidence in good faith, and even those who deliberately perjure themselves but do not do so as part of an extra-judicial conspiracy, remain entitled to *Briscoe* immunity.

In nevertheless rejecting the conspiracy exception, the Seventh Circuit, in an analysis that has been followed by other circuits, reasoned that someone "may not be prosecuted for conspiring to commit an act that he may perform with impunity." *House* v. *Belford*, 956 F.2d 711, 720 (7th Cir. 1992); see also *Mowbray* v. *Cameron County*, 274 F.3d 269, 277 (5th Cir. 2001) (quoting *House*, 956 F.2d at 720); *Jones* v. *Cannon*, 174 F.3d 1271, 1289 (11th Cir. 1999) (quoting *House*, 956 F.2d at 720). But this argument does not stand up to scrutiny. Conspirators may be prosecuted for agreeing to break the law even if their plans do not succeed. See *United States* v. *Jimenez Recio*, 537 U.S. 270, 274 (2003); *Salinas*, 522 U.S. at 65. And, of course, even though *Briscoe* holds that a perjurer may not be made civilly liable for false testimony under Section 1983, perjury remains "a corruption of the truth-seeking function of the trial process" (*United States.* v. *Agurs*, 427 U.S. 97, 104 (1976)) and a criminal act, as demonstrated by petitioner's prosecution and conviction for perjury in this case. Compl. ¶ 28. Persons who conspire to commit perjury thus manifestly may *not* perform the object

of their conspiracy "with impunity." For this reason—as the Seventh Circuit itself noted shortly after its decision in *House*—"constitutional wrongs completed out of court are actionable even if they lead to immunized acts." *Buckley* v. *Fitzsimmons*, 20 F.3d 789, 796 (7th Cir. 1994).

3. That especially should be so because immunity for conspiratorial conduct, at least as petitioner seems to contemplate it operating, would protect a wide range of misbehavior that is only tangentially connected to testimony in court. Petitioner presents this case as though it involves *only* false testimony. But that is not so: as we have explained, the complaint alleges that petitioner's conspiracy was not limited to coordinating plans to commit perjury, but also included further violations of respondent's civil rights, such as fabrication of evidence and false arrest. See Pet. App. 25a. And more generally, the practical reality is that conspiracy to commit perjury never comes to life, fully formed, in the grand jury room. The conspirators almost inevitably have had, as part of the conspiracy, pre-testimonial dealings with police officers, prosecutors, and others in the criminal justice process. And their conspiratorial acts necessarily extend well beyond the testimony itself. Invariably, for example, conspiratorial grand jury witnesses first tell their false stories to the prosecutor outside the jury room, an action closely akin to that of complaining witnesses who sign accusatory instruments that initiate a prosecution.

In such circumstances, petitioner presents no reason *why* he should be wholly immune from liability for conspiratorial actions taken prior to his perjury. Barring liability for wrongful conduct that is not wholly testimonial threatens to immunize actions

with only a tenuous connection to false testimony. But surely, absolute immunity should not be allowed to "spread backwards like an inkblot, immunizing everything it touches." *Guzman-Rivera* v. *Rivera-Cruz*, 55 F.3d 26, 29 (1st Cir. 1995); see also *Moldowan* v. *City of Warren*, 578 F.3d 351, 390 (6th Cir. 2009) ("[Immunity] does not extend to [defendant's] non-testimonial conduct, 'despite any connection these acts might have to later testimony.'"), cert. denied, 130 S. Ct. 3504 (2010); *Paine* v. *City of Lompoc*, 265 F.3d 975, 981 (9th Cir. 2001) ("This [absolute] immunity, however, is not limitless. * * * [It] does not shield non-testimonial conduct."). And although witnesses may not be held liable *for* their false testimony, evidence of coordinated perjury by conspirators may be used to establish a broader agreement to deny the plaintiff his or her civil rights—as it manifestly does in this case. See, *e.g.*, *Pearl* v. *City of Long Beach*, 296 F.3d 76, 87 (2d Cir. 2002) (finding that "it was a reasonable inference that the officers had agreed to present their allegedly false" testimony because it was identical).

A rule that recognized immunity in such circumstances would have bizarre and destructive consequences, allowing the fact of perjurious testimony at the end of the conspiracy to immunize the fabrication of evidence, false arrest, and malicious prosecution that took place at the outset. It also would create peculiar problems of administration. Petitioner's approach, for example, evidently would mean that suits could proceed against defendants who entered into a conspiracy to commit perjury that was uncovered before the testimony was offered (assuming, of course, that the conspiracy still injured the plaintiff), but that suit contesting that same conspiracy would be barred by immunity if the conspirators actually testi-

fied. There can be no justification for such a peculiar rule.

And to the extent there is any doubt on this score, it counsels in favor of delaying review of this case. The district court, "accepting all allegations in the complaint as true, and drawing all reasonable inferences in [respondent's] favor," found "that the allegations of an extra-judicial conspiracy in [respondent's] suit are sufficient to overcome [petitioner's] claim of absolute immunity at the motion to dismiss stage." Pet. App. 28a-29a. But additional fact-finding will proceed on this question, and the court specifically noted that it reached its conclusion "without prejudice to [petitioner] arguing that he is entitled to immunity at the summary judgment stage, after the parties have had the opportunity to conduct discovery." Pet. App. 34a n.8. It accordingly is possible that petitioner will be *awarded* immunity on remand. If he is not, additional factual development about the scope of the conspiracy would greatly assist the Court in its consideration of the issue presented by petitioner (assuming that issue warrants the Court's attention at all), as it would allow the Court to address both the extent of, and limits on, the extra-judicial conspiracy exception. In either case, review at this point is inappropriate.

B. The Truth-Seeking Mechanisms Of The Grand Jury Should Be Augmented By The Conspiracy Exception Because They Are Significantly Weaker Than Those Available At Trial.

In addition, the rationale for trial witness immunity identified in *Briscoe* applies with greatly diminished force in the grand jury setting. Grand juries need truthful information to protect citizens from

unwarranted indictments, yet they lack truth-seeking tools such as cross-examination with which to determine the veracity of witness testimony. The Court relied heavily on these truth-seeking mechanisms when it held in *Briscoe* that absolute immunity is desirable for trial witnesses because "the truth-finding process is better served if the witness's testimony is submitted to the crucible of the judicial process so that the fact-finder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies." *Briscoe*, 460 U.S. at 333-34 (internal quotations omitted).

Cross-examination has famously been identified by the Court as the "greatest legal engine ever invented for the discovery of truth." *California* v. *Green*, 399 U.S. 149, 158 (1970) (internal quotations omitted). But grand juries are "ex parte investigation[s]" rather than "adversary hearing[s]," and so do not permit cross-examination of witnesses. *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). Other truth-seeking mechanisms used by trial courts, such as confrontation by the opposing party (see *Crawford* v. *Washington*, 541 U.S. 36, 50-51 (2004)) and demeanor evidence (see *Green*, 399 U.S. at 158), are also less available to the grand jury. Defendants may not attend grand jury proceedings and, indeed, may never discover who appeared to testify. See *Giles* v. *California*, 128 S. Ct. 2678, 2689 (2008). And although oaths to tell the truth are administered before the grand jury, in the context of a conspiracy to commit perjury the value of the oath is negated because the conspirators have already committed a crime by agreeing to disregard it.

In *Briscoe*, this Court recognized that, when all of these tools are brought to bear on a trial witness's testimony, the fact-finder is provided with a sufficient basis on which to determine the truth. 460 U.S. at 333-334, 342. In contrast, the absence of these truth-seeking mechanisms in grand jury testimony makes the conspiracy exception essential to deterring extra-judicial conspiracies of the type alleged in this case.

III. PETITIONER OVERSTATES THE EXTENT AND EFFECT OF ANY DISAGREEMENT IN THE CIRCUITS.

Finally, petitioner maintains that, "[w]ith the exception of the Second Circuit, the totality of the Circuit Courts of Appeals that have considered this issue have held that a witness is entitled to the *Briscoe* grant of absolute immunity from liability from both the witness' testimony and from any conspiracy to commit perjury" (Pet. 14)—asserting that no fewer than seven circuits have rejected the conspiracy exception recognized by the Second Circuit. Pet. 14-20. On examination, however, this assertion of a pervasive conflict in the courts of appeals on the question presented here collapses. To be sure, a number of other courts have rejected a general conspiracy exception to *Briscoe*, and some have specifically disagreed with the Second Circuit's reasoning on that question. See *Mowbray*, 274 F.3d at 277; *Franklin* v. *Terr*, 201 F.3d 1098, 1102 (9th Cir. 2000); *Cannon*, 174 F.3d at 1288-1289; *Miller* v. *Glanz*, 948 F.2d 1562, 1570 (10th Cir. 1991). But the decisions cited by petitioner differ in material respects from this one; it is not at all apparent that *this* case would have been decided differently in those courts. Particularly because the issue here is one that arises in-

frequently, there accordingly is no need for intervention by this Court now.

A. This Case Is Distinguishable From Those Decided By Other Circuits Because It Involves A Broader Conspiracy.

At the outset, most of the decisions cited by petitioner did not squarely address the question presented in this case. Petitioner conspired to (i) falsify evidence leading to respondent's arrest, (ii) synchronize post-arrest statements with Officer Vara, and (iii) falsify testimony leading to a grand jury indictment. See Pet. App. 8a-10a, 30-33a; Compl. ¶¶ 27, 46. Yet most of the allegedly conflicting decisions cited by petitioner considered conspiracies that were directed exclusively at testimony: those conspiracies were conceived close to the date of the testimony and aimed specifically at procuring false testimony. Thus, it is not clear that the courts deciding those cases would have rejected a conspiracy exception on the facts of this case.

Two of the decisions cited by petitioner involved conspiracies to coerce expert witnesses to provide false or prejudicial testimony. Given this focus on the expert witnesses' role at trial, these conspiracies were necessarily directed at the testimony itself. See *Franklin*, 201 F.3d at 1101-1102 (conspiracy between prosecution psychiatrist and state's witness to coordinate false testimony); *Moses* v. *Parwatikar*, 813 F.2d 891, 891 (8th Cir. 1987) (conspiracy between prosecutor and court-appointed psychiatrist to find defendant competent to stand trial). A third similarly involved assertions that a state social worker and a state psychologist conspired to give false testimony

in support of child abuse charges. *Watterson* v. *Page*, 987 F.2d 1 (1st Cir. 1991).[8] A fourth, although alleging a conspiracy that began well before the assertedly false testimony was given, was concerned exclusively with an agreement to present perjurious testimony. *Alioto* v. *City of Shively*, 835 F.2d 1173, 1174 (6th Cir. 1987). In two other cases, the plaintiffs, although also alleging a number of other significant wrongful acts by the defendants, limited their allegations of conspiracy to the claim that the defendants "conspire[d] to present perjured testimony in furtherance of a criminal conviction" (*Glanz*, 948 F.2d at 1571) or "suborned false testimony." *Cannon*, 174 F.3d at 1288. Finally, petitioner cites two Seventh Circuit cases, both of which involved a conspiracy similarly limited to the testimony itself. *House*, 956 F.2d at 720 ("[Plaintiff] alleged [an] underlying conspiracy between [defendant] and Robbins to present

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[8] And, in any event, the language in *Watterson* on which petitioner relies is dicta. See 987 F.2d at 8-9. District courts in the First Circuit have recognized that, as a result, *Watterson* is not binding law for conspiracies to commit perjury. See, *e.g.*, *Maher* v. *Town of Ayer*, 463 F. Supp. 2d 117, 122 n.10 (D. Mass. 2006) ("To the extent that Maher is suggesting a pretrial conspiracy between Taylor and Goss to present perjured testimony at trial, there is case law supportive of a cause of action on this basis."); *Mitchell* v. *City of Boston*, 130 F. Supp. 2d 201, 211 (D. Mass. 2001) ("The First Circuit has not yet had the opportunity to speak with a firm voice in the post-*Briscoe* debate."); *ibid.* (finding that plaintiffs in First Circuit cases have never pled adequate facts to demonstrate an extra-judicial conspiracy exception to *Briscoe*); *Cignetti* v. *Healy*, 89 F. Supp. 2d 106, 117 (D. Mass. 2000) ("[W]itnesses may be sued under § 1983 for their testimony if the testimony they gave was part of a conspiracy consisting of their testimony and other non-testimonial acts."); see also Michael Avery, David Rudovsky & Karen Blum, *Police Misconduct: Law and Litigation* § 3:1 (2010).

the false testimony."); *Wilkins* v. *May*, 872 F.2d 190, 192 (7th Cir. 1989) (involving a "charg[e] that they had conspired to convict him of a crime he had not committed by giving perjured testimony").

There is substantial reason to believe that the more limited nature of the conspiracies alleged in these cases determined the courts' rulings on the conspiracy exception. In fact, five of these circuits have held that the absolute immunity afforded testimony does *not* retroactively immunize conduct that preceded the testimony. See *Spurlock* v. *Satterfield*, 167 F.3d 995, 1003-1004 (6th Cir. 1999) ("[A]bsolute immunity for testimony is a shield[,] * * * not a sword allowing [witnesses] to trample the statutory and constitutional rights of others. * * * [Witnesses are] not entitled to absolute immunity in performing any nontestimonial or pre/post-testimonial acts."); *Guzman-Rivera*, 55 F.3d at 29 (absolute immunity does not "spread backwards like an inkblot, immunizing everything it touches"); *Ienco* v. *City of Chicago*, 286 F.3d 994, 1000 (7th Cir. 2002) (noting that extra-testimonial conduct is not shielded by absolute immunity); *Paine*, 265 F.3d at 981 (same); *Thomas* v. *Hungerford*, 23 F.3d 1450, 1453 (8th Cir. 1994) (same). It may well be, as a consequence, that these courts would decline to award immunity when—as in this case—the conspiracy produced a range of acts, of which perjury was only the concluding part.[9]

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[9] Petitioner cites a total of seven purportedly conflicting circuits. Pet. 14. He fails to cite *Mowbray*, which is similar to the decisions he does cite and distinguishable for the same reasons. 274 F.3d at 275-276 (extending immunity to a conspiracy to cover up potentially exonerating forensic test results and mislead the grand jury).

B. This Case Is Distinguishable From Most Others Because It Involves Grand Jury Testimony.

In addition, this case involves a conspiracy to commit perjury before a grand jury. Although the Second Circuit applies the conspiracy exception to perjury before both grand and petit juries, it is not at all clear that other circuits would treat trial and grand jury testimony equivalently. There is no way to be sure about that: six of the purportedly conflicting circuits have not yet considered the extra-judicial conspiracy exception in the context of grand jury testimony. The First, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have not; only the Sixth and Eleventh Circuits have. See *Cannon*, 174 F.3d 1271; *City of Shively*, 835 F.2d 1173.

And here, too, there is reason to believe that this distinction will make a difference: at least one circuit whose rule is relied upon by petitioner has suggested that grand jury testimony should *not* benefit from the same absolute immunity as trial testimony. See *Harris*, 126 F.3d at 1198 ("[Defendants'] argument here is * * * that if a conspiracy to lie is so successful that on the basis of the lies a grand jury finds probable cause, the conspirators become immunized for the constitutional injury they have caused. We disagree."). This is not surprising; as discussed above, there are a number of reasons why it makes sense for absolute *Briscoe* immunity to govern testimony at trial but not to shield extra-judicial conspiracies involving perjurious grand jury testimony. It thus cannot be assumed that circuits that have not had the opportunity to consider this issue will reject the Second Circuit's rule in the grand jury context.

C. The Second Circuit Applies The Extra-judicial Conspiracy Exception Too Infrequently For It To Pose A Significant Issue Meriting Review By This Court.

Against this background, whatever tension may exist in the ways in which the Second and other Circuits state their rules governing application of the conspiracy exception, there is no square conflict between the decisions of the courts: the courts of appeals have not reached differing conclusions in cases presenting substantially identical facts. There accordingly is no compelling need for the Court to address the matter now.

That is especially so because the issue here arises in the Second Circuit with great *in*frequency. In arguing to the contrary, petitioner contends that the Second Circuit's decisions in *San Filippo* and *Dory* "create[] a back door to the liability of witnesses for their testimony before a Grand Jury that was not envisioned by th[is] * * * Court in *Briscoe*." Pet. 19. The Second Circuit's extra-judicial conspiracy exception, however, creates liability based on the actions leading to perjurious testimony, rather than for the testimony itself. See *Dory*, 25 F.3d at 83. Indeed, *San Filippo* anticipated and repudiated the argument that the exception could be so broadly construed as to vitiate the immunity afforded by *Briscoe*. *San Filippo*, 737 F.2d at 255. Instead, the court of appeals stressed that the exception must be very cautiously allowed, that it is "imperative" for courts to "examine with great care" suits charging extra-judicial conspiracies, and that courts must "dismiss on pre-trial motion those that are clearly baseless." *Id.* at 256.

Courts in the Second Circuit have taken this guidance to heart, construing the conspiracy exception narrowly and applying rigorously the protections "provided by the possibility of 12(b)(6) dismissal or summary judgment in defendants' favor." *San Filippo*, 737 F.2d at 255. In the 25 years since *San Filippo* was decided, it appears that there have been a total of 23 cases in the Second Circuit bringing a Section 1983 claim against an individual other than a prosecutor for conspiracy to commit perjury.[10] Of these 23 cases, an allegation of extra-judicial conspiracy to testify falsely has survived the summary judgment stage a total of six times prior to the instant case. And of these, our research has revealed *no* case in which the defendant was found liable for participation in an extra-judicial conspiracy to commit perjury.[11]

The extra-judicial conspiracy exception thus is not the significant loophole that petitioner suggests.

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[10] *San Filippo* was decided before the Supreme Court's decision in *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993). *Dory* subsequently applied *Buckley* to limit *San Filippo*'s rule, holding that prosecutors are immune from the extra-judicial conspiracy exception when acting as an advocate. *Dory*, 25 F.3d at 83-84.

[11] Two of these cases settled. See Docket Order of Discontinuance, *Sheff* v. *City of New York*, No. 03-cv-00708 (S.D.N.Y. June 1, 2006); Settlement Agreement & Release, *Cipolla* v. *County of Rensselaer*, No. 99-cv-01813 (N.D.N.Y. Feb. 5, 2002). Three others were resolved in favor of the defendant. Order, *Dory* v. *Ryan*, No. 92-cv-04351 (E.D.N.Y. Sept. 18, 1998) (charges subsequently dropped); Stipulation and Order of Dismissal, *Tribune Co.* v. *Purcigliotti*, No. 93-cv-07222 (S.D.N.Y. Feb. 11, 1998) (dismissed with prejudice); Jury Verdict, *Taylor* v. *Hansen*, No. 85-cv-1643 (N.D.N.Y. June 23, 1993) (verdict for the defendant). Electronic records are not available from the remaining case.

It is a narrow doctrine that courts in the Second Circuit have carefully limited through the standard procedural tools. As such, petitioner's suggestion that the extra-judicial conspiracy exception threatens to undermine *Briscoe* is, based on 25 years of experience, plainly false. And for that reason as well, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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